

COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION

Decision mailed: 6/20/08  
Civil Service Commission  
CB

SUFFOLK, ss.

PAUL BOMBARA,  
Appellant

v.

D-06-110

DEPARTMENT OF MENTAL HEALTH,  
Respondent

Appellant's Attorney:

*Pro Se*  
Paul Bombara  
2 Northgate Circle  
Lexington, MA 02420

Respondent's Attorney:

Robert R. Wagner  
Deputy General Counsel  
Department of Mental Health  
25 Staniford Street  
Boston, MA 02114

Commissioner:

Daniel M. Henderson

**DECISION**

The Appellant, Paul Bombara (hereinafter "Appellant"), pursuant to G.L. c.31 § 43, filed an appeal with the Civil Service Commission, (hereinafter "Commission") on May 19, 2006, claiming that the Commonwealth of Massachusetts Department of Mental Health (hereinafter "DMH" or "Appointing Authority") did not have just cause to eliminate his position as a Psychologist Assistant IV effective September 3, 2006. The appeal was timely filed. A hearing was held on November 27, 2007 at the Commission. As no written notice was received from

either party, the hearing was declared private. The witnesses were not sequestered. One tape was made of the hearing and is retained by the Commission.

#### **FINDINGS OF FACT:**

Five (5) exhibits were entered into evidence. Based upon the documents entered into evidence and the testimony of Marianne Dill for the Appointing Authority, and the Appellant, I make the following findings of fact:

1. The Appointing Authority is a State agency providing mental health services.  
(Testimony and Exhibits)
2. Marianne Dill is now the Labor Relations Director for Commonwealth of Massachusetts, Executive Office of Human Services. She was previously employed at the Department of Mental Health as a Labor Relations Specialists. She has been employed in the labor relations field in New England for the past 13 years. She is very familiar with all of the subsistent issues in this field for employment with the Commonwealth, including: job specifications for titles, classifications, labor issues and collective bargaining agreements etc. (Testimony of Dill)
3. The Appellant is a member of a union. He is a member of the Massachusetts Nurses Association (MNA), which is his collective bargaining representative. (Testimony of Appellant and Dill)
4. Pursuant to an agreement between the Appointing Authority and the Appellant's union (MNA), the Human Resources Division (HRD) for the Commonwealth did reallocate all unlicensed Psychologists to the title of Psychological Assistant, effective June 3, 2003.

The Appellant was then reallocated to the title of Psychology Assistant IV. (Testimony of Dill, Exhibit 1)

5. Pursuant to the Collective Bargaining Agreement, Psychology Assistants can not "Bump" based on seniority, down to a lower title. (Testimony of Dill)
6. The Appellant was employed by the Appointing Authority as a Psychologist IV, at the DMH-North East Area, until his position was reclassified as a Psychological Assistant VI on June 3, 2003. Thereafter, he remained employed by the Appointing Authority, without a reduction in pay, as a Psychological Assistant IV until he was laid off effective September 3, 2006. He was then, a tenured employee. (Testimony and Exhibits 1, 2, 3 & 5).
7. This reclassification from Psychologist IV to Psychological Assistant IV was bargained for and agreed to by the Massachusetts Nurses Association. The Appellant was given notice of this reclassification on or about August 14, 2003 (Exhibits 1 & 2).
8. During 2003 and thereafter, the Appointing Authority experienced an increasing need for Designated Forensic Psychologists (DFP). The need was at least partially due to a more than fifty (50%) per cent increase in the number of "dangerousness" determinations for the criminal courts. Dangerousness determinations became the greatest proportion of the work performed by the DMH-North East area, where the Appellant was employed. The Psychologists (DFN) were mandated by state law to be licensed and certified to perform the dangerousness evaluations or determinations. The Appellant was unlicensed and therefore unable to perform the dangerousness evaluations. (Testimony of Dill, Exhibit 2)

9. The second greatest proportion of work that needed to be performed at the North East area was the writing-up of patient "case summaries". The Appellant was unable to write-up these case summaries due to his lack of licensure. (Testimony of Dill)
10. Another change that occurred after 2003, at the North East area was that the Psychologists no longer supervised students in Master's degree programs. This supervision had previously consumed a substantial amount of the Psychologists' time. (Testimony of Dill)
11. State psychologist licensure is required for Psychologists to write-up patients "case summaries" and this work was assigned to Designated Forensic Psychologist. (Exhibit 2).
12. In June 2003, the Appointing Authority negotiated with the MNA and as a result HRD changed the psychologist job series and specifications to ensure that any newly hired psychologists were eligible to perform as Designated Forensic Psychologist (Exhibit 1).
13. Effective on or about June 3, 2003, the Appointing Authority included State psychologist licensure as a requirement for the Psychologist position and it created the new job series of Psychology Assistant for psychologists, such as the Appellant, who had no license (Exhibits 1 & 2).
14. On or about June 3, 2003, the Appellant was reclassified as a Psychologist Assistant IV, with no diminution in pay or benefits. From this date until he was laid off, the Appellant was the only unlicensed psychologist, and hence the only Psychologist Assistant, within the Appointing Authority work unit (North East Area). (Exhibit 3).
15. In 2006, the Appointing Authority experienced a budget shortfall and was required to cut costs. In May, 2006, the Appointing Authority notified the MNA that due to the budget shortfall that layoffs were expected shortly. (Testimony of Dill)

16. At that time, the forensic workload was high, the Appointing Authority believed that it did not have enough Designated Forensic Psychologists to perform the work, and the Appellant, partly because he could not perform the forensic work, increasingly was performing administrative duties. (Testimony of Dill)
17. In 2006, to cut costs with the least effect on services, the Appointing Authority determined to cut social work and nursing positions, as well as the Appellant's Psychologist Assistant IV position. Four Rehabilitation Counselor positions were also eliminated. Any position that was vacated through attrition, at that time was left unfilled to further save funds. No full time Psychologists or Psychological Assistants have been hired since the Appellant was terminated. (Testimony of Dill and Exhibit 3).
18. The Appellant was notified by letter dated May 15, 2006, that he would be laid off effective July 1, 2006. At that time, a DMH hearing was scheduled and the Appellant was given the appropriate sections of G.L chapter 31. (Exhibits 4, 5 & 6).
19. The Appellant was the only Psychological Assistant IV in the work unit (Exhibit 3).
20. The Appellant requested that his layoff date be extended to September 3, 2006, to which the Appointing Authority agreed, and the Appellant was laid off on that date (Exhibits 5 & 6).
21. Some of the administrative tasks that the Appellant performed have been taken over by clerical staff, and the Appointing Authority has not refilled the Psychologist Assistant IV position. (Testimony of Dill)

## **CONCLUSIONS AND FINDINGS**

When presented with an appeal pursuant to G.L. c. 31, § 43, the Commission seeks to determine whether the Appointing Authority had reasonable justification for the action taken

against the Appellant. City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997), Town of Watertown v. Arria, 16 Mass.App.Ct. 331 (1983), McIsaac v. Civil Service Commission, 38 Mass.App.Ct. 473, 477 (1995), Police Department of Boston v. Collins, 48 Mass.App.Ct. 411 (2000), City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728 (2003).

"The removal of a tenured civil service employee for a lack of funds is an action that the appointing authority may only make with requisite just cause, and that finding of just cause is subject to the Commission's review." LePage v. Department of Mental Retardation, No. D-03-416 (2005). G.L. c. 31, § 39 provides that, "Any action by an Appointing Authority to separate a tenured employee from employment for the reasons of lack of work or lack of money...shall be taken in accordance with the provisions of section forty-one." The Department held a hearing on Bombara's layoff, in accordance with G.L. c. 31, § 41.

Documentary evidence and testimony demonstrates that the Appointing Authority was faced with a legitimate lack of funding that necessitated the elimination of the Appellant's Psychologist Assistant IV position. Economic reasons, such as lack of funds, may constitute just cause for separation from service of a tenured Civil Service employee and/or the abolishment of a position. G.L. c. 31, s. 39, *see* Denham v. Belmont, 388 Mass. 632, 634 (1983); Mayor of Somerville v. District Court of Somerville, 317 Mass. 106 (1944); Commissioner of Health and Hospitals of Boston v. Civil Service Commission, 23 Mass. App. Ct. 410, 413 (1987); City of Gardner v. Bisbee, 34 Mass. App. Ct. 721, 723 (1993). "The courts have ruled that the Appointing Authority is to have great discretion in making this determination," and the Commission "may not, in the guise of protecting an aggrieved employee, substitute its judgment for that of an appointing authority as to the wisdom of a particular reorganization plan undertaken for reasons of economy." Holman v. Arlington, 17 MSCR 108 (2004), *citing* School

Committee of Salem v. Civil Service Commission, 348 Mass. 696, 698-699 (1965). Therefore, absent evidence demonstrating that a separation for lack of funds is but a mere pretext for another improper motive for separation, the Commission cannot override a good faith determination by the appointing authority that such separation is made for cost-saving purposes. Gloucester v. Civil Service Commission, 408 Mass. 292, 299-300 (1990), Shaw v. Board of Selectmen of Marshfield, 36 Mass.App.Ct. 924, 926 (1994), Sheriff of Plymouth County v. Personnel Board, 440 Mass. 711, 713 (2004).

The Appointing Authority's reclassification of the Psychology IV position to Designated Forensic Psychologist occurred in response to the Department's anticipated need for psychologists which possessed additional qualifications, including licensure, to practice forensic psychology. The Appellant was the only unlicensed psychologist and therefore did not meet the license requirement for the Designated Forensic Psychologist position. Instead of terminating the Appellant, the Appointing Authority created the Psychologist Assistant IV position. The Appellant was the only employee placed in that series, and suffered no diminution in wage, salary, or benefits. The Massachusetts Nurses Association, of which the Appellant is a member, bargained for and consented to the creation of the Psychologist Assistant IV position. The Appellant's reclassification occurred three years prior to his lay-off: during this time the Appellant did not obtain a licensure as a Designated Forensic Psychologist.

There has not been a vacant budgeted Psychologist Assistant IV position in the Department since the 2003 reclassification. The Appellant was laid off from his position on September 3, 2006. The Appointing Authority has shown in this matter that it has not had the funds available in its FY 2006 budget for any new Psychologist Assistant IV vacancies.

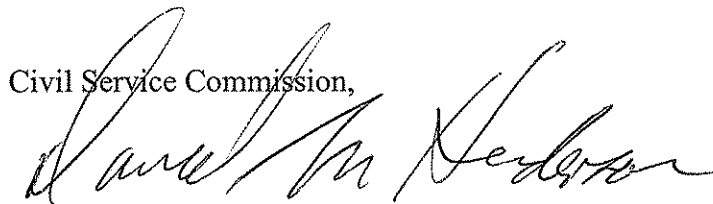
G.L. c. 31 § 2(b) requires that in order for an individual to have standing before the Commission, the individual must be aggrieved of a decision, action or failure to act by the administrator. A person aggrieved is further defined as one whose "rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status." *Id.*

In the instant matter, the Appellant claims that other higher-graded employees and administrative staff who were not laid off are doing his former duties. The Commission's recent decision in LePage v. Department of Mental Retardation, No. D-03-416 (2005) (Psychologist Associate III assumed caseload of Psychologist Associate I following Psychologist Associate I's separation from employment for lack of funds) confirms that higher-graded employees may assume the duties previously performed by lower-graded personnel prior to a layoff. Further, the Appellant's failure to secure a licensure precludes him from performing the duties and responsibilities of Psychologists. The Appellant had no bumping rights simply due to the fact that there were no junior or senior employees to the Appellant within the Psychologist Assistant IV position.

The Department has met its burden of producing a preponderance of credible evidence to demonstrate that the Appellant's separation in May 2006 for lack of funds was reasonably necessary as a cost-saving function.

WHEREFORE, the Appellant's Appeal under Docket No. D-06-110 is hereby *dismissed*.

Civil Service Commission,

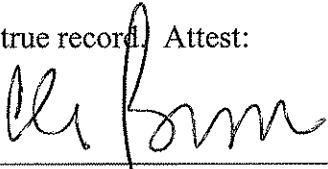
A handwritten signature in black ink, appearing to read "Daniel M. Henderson", is written over a horizontal line.

Daniel M. Henderson,  
Commissioner



By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis and Taylor and Stein Commissioners) on June 19, 2008.

A true record. Attest:

  
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Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice sent to:  
Paul Bombara  
Robert R. Wagner, Atty.